No. 3911

In The

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF ANTIOCH (A Corporation),

Plaintiff in Error,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICHELDERFER and W. N. MORSE,

Defendants in Error.

Brief of Defendants in Error Upon Writ of Error to the District Court of the United States for the District of Oregon.

JOSEPH, HANEY and LITTLEFIELD,
PLOWDEN STOTT,
Attorneys for Defendants in Error.

FILED
OCT 9 - 1922
F. D. MONCKTON,
CLERK.

Marsh Printing Company

No. 3911

In The

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF ANTIOCH (A Corporation),

Plaintiff in Error,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICHELDERFER and W. N. MORSE,

Defendants in Error.

Brief of Defendants in Error Upon Writ of Error to the District Court of the United States for the District of Oregon.

STATEMENT.

Without desiring to criticise counsel's statement of facts, we think an amplification of it will be helpful to the court.

On November 25, 1919, in the Circuit Court of the State of Oregon, for Sherman County, First National Bank of Antioch, plaintiff in error herein, instituted an action at law against H. B. Thornberry to recover from said H. B. Thornberry the sum of $12,906.08, with interest and costs, and for the further sum of $1,660.00 as attorney's fees, upon a contract for the direct payment of money. On said 25th day of November, 1919, a writ of attachment was issued out of said court, in said action, and on said day the Sheriff of Sherman County, Oregon, levied upon all of the real property of said H. B. Thornberry in said Sherman County, Oregon, that is, upon about 2,000 acres of farm lands.

On the 17th day of January, 1920, said H. B. Thornberry, having appeared in said action, applied to the court for a release and discharge of the attachment and delivered to the judge of said court, and filed in said action, a bond or undertaking, duly executed by the defendant in said action, H. B. Thornberry, and all of the parties who are defendants in error in the present action now before the court, *and which said bond specifically provided that it was drawn and given in compliance with Sections* 310 *and* 311 *Oregon Laws,* and for the purpose of securing a release of the attachment against the real property of H. B. Thornberry, and provided, amongst other things, that said sureties on behalf of defendant, H. B. Thornberry, are bound to the plaintiff in the sum of $15,000 and the costs and

disbursements of the action. Upon the giving and filing of said bond or undertaking in said action, the attachment upon the real property of defendant, H. B. Thornberry, was released and discharged.

On January 12th, 1922, plaintiff in error, who was plaintiff in the Sherman County, Oregon, case, recovered a judgment against said H. B. Thornberry in said action for the sum of $13,902.50. On January 12, 1922, plaintiff in error failed and neglected to take judgment against the sureties on said undertaking, as provided by Section 308, Oregon Laws.

Thereafter, plaintiff in error made demand upon the sureties for the payment of said judgment, but demand was refused. Thereupon, plaintiff in error brought this action and has sued all the sureties jointly and collectively, and has attached their and each of their real property in the State of Oregon.

Defendants in error filed a demurrer to plaintiff's complaint, specifying the following grounds of demurrer, to-wit:

(a) That the Court has no jurisdiction of the person of the defendants, or the subject of the action.

(b) That the plaintiff has not legal capacity to sue.

(c) That he complaint does not state facts sufficient to constitute a cause of action.

The District Court in oral opinions (transcripts of which are printed in an appendix to the brief of counsel for plaintiff in error) sustained defendants' demurrer on the ground and for the reasons:

(1) That the bond in this case is a statutory bond and such was the holding of the Court of Appeals in this District, in the case of EBNER v. HEID, 125 Fed. 680, in which case the court had occasion to construe and consider a bond in language almost exactly the same as the one now in question;

(2) That the undertaking provided in Section 311, Oregon Laws, stood in place of the attachment and that under the Oregon law, failure to take an order of sale of the attached property at the time judgment was entered, waived the lien of attachment;

(3) That the Oregon Courts have held repeatedly and that it is the established rule that any order determining the amount of the judgment and not ordering the sale of the attached property, itself is a waiver of the attachment lien;

(4) Inasmuch as under the Oregon decisions the bond stood in place of the attachment requiring a like judgment to be entered against the surety, a failure to so enter the judgment against the surety releases the surety.

POINTS AND AUTHORITIES.

I.

The bond in this case is in effect a statutory bond provided for in Section 311 Oregon Laws.

Section 311 Oregon Laws;
Ebner v. Heid, 125 Fed. 680.

II.

Section 308 Oregon Laws, providing that the court shall, upon giving judgment against the defendant, shall also give judgment in like manner and with like effect against the sureties in the undertaking, is mandatory and peremptory.

Ah Lep v. Gong Choy, 13 Or. 431;
McCargar v. Moore, 88 Or. 685;
6 Corpus Juris, Sec. 740, p. 350.

III.

That Section 308 Oregon Laws is mandatory and peremptory is further shown by the language therein, which provides that

> "If judgment is recovered by the plaintiff and it shall appear that property has been attached in the action . . . the court shall order and adjudge the property to be sold."

and the construction of this statute by the Supreme Court of Oregon, holding that a failure to order a sale of the attached property is a waiver of the attachment lien.

Bremer v. Fleckenstein, 9 Or. 266;
Moore Mfg. Co. v. Billings, 46 Or. 403;

Mertens v. Northern State Bank, 68 Or. 279;
Smith v. Dwight, 80 Or. 14.

IV.

If a failure to order the sale of the property attached waives the lien of the attachment, so does a failure to enter judgment against the sureties waive recourse against the sureties.

V.

Attachment proceedings are statutory and unless the statute is strictly pursued, no right is acquired under them.

Schneider v. Sears, 13 Or. 69, 74;
Murphy v. Bjelik, 87 Or. 352;
6 Corpus Juris, Sec. 740, p. 350;

VI.

The signing of a bond to release an attachment by sureties, makes them parties and constitutes a general appearance by them.

Section 310 Oregon Laws;
Winters v. Union Packing Co., 51 Or. 97, 99;
Spores v. Maude, 81 Or 11, 17;
Anvil Gold Mining Co. v. Hoxsie, 125 Fed. 724, 728;
Roethler v. Cummings, 84 Or. 442, 448;
4 Corpus Juris, p. 1331, Sec. 25.

VII.

The judgment against Thornberry in the Circuit

Court of Sherman County, Oregon, is res adjudicata as to the sureties, the defendants in error herein, for the reason that the sureties were in court in that case as parties, and the issue in that case, namely, the liability of the sureties, is the same issue as is presented in the case at bar

Holbrook v. Investment Co., 32 Or. 106;
Beall v. New Mexico, 16 Wall. 835;
Roethler v. Cummings, 84 Or. 447 (point 9);
4 Corpus Juris, p. 1331, Sec. 25;

VIII.

The United States District Court for the District of Oregon did not have jurisdiction of this action, for the reason that jurisdiction thereof was vested in the Circuit Court of the State of Oregon, for Sherman County, which had full power and authority to grant the same relief against the defendants in error herein, as is sought in this court.

Holbrook v. Investment Co., 32 Or. 106;
Beall v. New Mexico, 16 Wall. 835;

IX.

Plaintiff in error at the time it instituted its action against H. B. Thornberry, had the choice of bringing the action in the State or Federal Court. The state court was chosen and obtained jurisdiction of the parties and the subject matter. This jurisdiction was exclusive and deprived any other court from obtaining jurisdiction.

Oh Chow v. Brockway, 21 Or. 440;

Matlock v. Matlock, 87 Or. 307, 312, 313;
Mound City Co. v. Castleman, 187 Fed. 921, 926;
Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294, 305;
7 R. C. L. p. 1067, Sec. 105.

ARGUMENT.

Counsels' principal contentions, as we gather from their brief, may be summarized as follows:

1. The bond in this case is not the statutory bond provided in Section 311, Oregon Laws, and therefore the plaintiff could not have taken judgment against the sureties at the time judgment was entered against Thornberry.

2. That the bond, not being the statutory bond, is a common law bond, on which recovery may be had in an independent action and in a manner different from that provided in the statute.

3. That the bond is statutory only so far as it operated to dissolve the attachment, but a common law bond for the purpose of holding the sureties.

4. That conceding the bond to be the statutory bond provided in Section 311, it nevertheless is a common law bond also, and plaintiff has his option to take judgment against the sureties as provided by the statute, or sue them in another action. In other words, that the statute provides not an exclusive but a cumulative remedy.

To every one of these contentions we say that the very opposite is true. And first we contend that the bond is the statutory bond provided in Section 311, Oregon Laws, because it specifically states that it was given in compliance with Sections 310 and 311. Furthermore, it was given for the purpose of dissolving the attachment, and was accepted by the court and all the parties for that purpose, and accomplished that result.

Now, Section 311, Oregon Laws, reads as follows:

> "*Sec.* 311. *UNDERTAKING UPON APPLICATION TO DISCHARGE ATTACHMENT.* Upon such application, the defendant shall deliver to the court or judge to whom the application is made an undertaking, executed by one or more sureties, resident householders or freeholders of this state, to the effect that the sureties will pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action. If the plaintiff demand it, the sureties shall be required to justify in the same manner as bail upon an arrest."

It will thus be seen that it provides no particular form for the bond, except simply to say that it shall be to the "effect that the sureties will pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action."

The bond in the case at bar is to the effect declared in the statute. It is to the effect that the sureties will pay the plaintiff the amount of his judgment against the defendant, for it says so in so

many words. The language of the bond is, omitting for the present the two clauses "on demand" and "or in default thereof," that "we, the sureties, will pay to the plaintiff the amount of the judgment he may recover against the defendant in said action." Thus it will be seen, by eliminating these clauses, we have almost the exact language of the statute. The effect of that language cannot be changed by adding the clause "on demand." The bond is still to the effect that the sureties will pay, etc.

This court held, in EBNER v. HEID, 125 Fed. 683, in construing an attachment bond under this same statute, that a promise to pay the judgment "on demand" was equivalent to an agreement to pay the judgment if one was recovered against the defendant.

Now, the effect of the bond is not changed from that declared in the statute by the addition of the clause "or in default thereof", for that is nothing more than is implied by law in every obligation assumed by a surety. It is implied in the word "surety" itself. The surety pays if the principal defaults, and it is not a deviation from the effect of the statute to say in words what is implied by law.

The bond in this case is almost exactly like the bond construed by this court in EBNER v. HEID, supra. In that case the bond recited:

> "We, the undersigned, . . . in consideration of the premises and in consideration of the re-

lease from attachment of all the property attached as above mentioned, and the discharge of said attachment, do hereby jointly and severally undertake and promise that in case said plaintiffs recover judgment in said action, the defendant will, on demand, pay to the said plaintiffs the amount of said judgment, together with the costs and disbursements of this action."

The bond in this case is set out on pages 2 and 3 of plaintiff's brief, but for convenience we recite it here:

"WHEREAS, P. H. Buxton, Sheriff of Sherman County, Oregon, by virtue of a writ of attachment issued in said court and cause, has attached certain property of defendant's, to-wit: all the real property owned by the said defendant in said Sherman County, Oregon, and said defendant having applied to the said court upon due notice to the plaintiff, for an order to discharge said attachment and to release said property from the lien thereof, in compliance with Sections 310 and 311, Lord's Oregon Laws:

"NOW THEREFORE, in consideration of the premises, and for the purpose of the making of said order, we, the undersigned, H. B. Thornberry, as principal, and R. H. McKean, Geo. N. Crosfield, C. B. Hearing, W. A. Medler, A. D. Richelderfer, and W. N. Morse, residents and freeholders in said County and State, as sureties, undertake, on behalf of defendant, and are bound to the plaintiff in the sum of $15,000.00, and promise the plaintiff that, in case the plaintiff recover judgment in said action, the defendant will, or in default thereof, we, his sureties, will, on demand, pay to the plaintiff the amount of the judgment that he may recover

> against the defendant in said action, not exceeding the amount of $15,000.00 and the costs and disbursements of said action."

Judge Bean, in comparing these bonds, held in his opinion, (Page 3 of the appendix of plaintiff's brief) that these bonds were almost exactly in the same language, and as this court held the bond in Ebner v. Heid to be the statutory bond, the learned trial judge followed that opinion. Judge Bean stated in his opinion that the bond here is "in language almost exactly the same" as the bond considered and construed by this Court in Ebner v. Heid.

Let us suppose for a moment that when the plaintiff took judgment against Thornberry it had demanded judgment against the defendants, as provided by Section 311, and the defendants had there made the same contention that plaintiff is making here. Defendants must then have said to the court: "We made this bond for the purpose of dissolving the attachment. It was accepted by the court and the plaintiff, and accomplished that purpose. We said in the bond itself that it was given in compliance with Sections 310 and 311, Oregon laws. Section 308 says that if the property attached shall have been released by reason of the giving of the undertaking by defendant, *as provided by Section* 311, the court shall, upon giving judgment against the defendant or defendants, also give judgment, in like manner and with like effect, against the surety or sureties in such undertaking. But, notwith-

standing this provision of Section 308, we now say that the court cannot give judgment against us, for we specified in our bond that we would pay on demand, and upon defendant's default." Would not the reasoning by this court in Ebner v. Heid be a complete answer to any such claim? We think it would. It is not because of the form or language of the bond that judgment must be taken against the sureties along with the defendant, but it is the language of the statute, which says that the judgment shall be so taken. So that in any attachment bond in Oregon that is sufficient under Section 311 to dissolve the attachment, judgment must be taken against the sureties when it is taken against the defendant, or judgment against the sureties is waived. In other words, the statute is mandatory.

Section 308, Oregon Laws, being the section pertaining to the entry of judgment against the sureties on attachment, reads as follows:

> Sec. 308. *ORDER SHALL DIRECT SALE OF ATTACHED PROPERTY, WHEN.* If judgment is recovered by the plaintiff, and it shall appear that property has been attached in the action, and has not been sold as perishable property or discharged from the attachment as provided by law, the court shall order and adjudge the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the sheriff shall apply the property attached by him or the proceeds thereof, upon the execution, and if there be any such property or proceeds remaining after satisfying such execution, he shall, upon demand, de-

> liver the same to the defendant; or if the property attached shall have been released from attachment by reason of the giving of the undertaking by the defendant, as provided by section 311, *the court shall upon giving judgment against the defendant or defendants, also give judgment in like manner and with like effect against the surety or sureties in such undertaking.*

The failure of plaintiff in error to enter judgment in the State Court against the sureties, waives its right to institute a new action against the sureties, who are defendants in error herein. The provisions of the statute (Section 308 Oregon Laws) are *mandatory* and *peremptory,* wherein it provides that judgment *shall be entered against the sureties at the time of the entry of judgment against the defendant.*

The statute is mandatory, first: because it appears to be such from the language employed. The statute says *"shall,"* and unless there is some other controlling consideration, such language imports a peremptory direction to the plaintiff. This direction being peremptory, if the plaintiff sees fit to forego the remedy that the statute affords it, it would necessarily follow that it could not afterwards change its mind and obtain a remedy that is not afforded by the statute.

The statute should be construed to be mandatory for a second reason: an attachment is a statutory proceeding. The bond involved in this case is a stat-

utory bond. The remedy given plaintiff on the bond is a statutory remedy. The statute must therefore be the guide and the limit as to the remedy sought. It is a well known principle in interpretation, that where a statute provides a remedy, upon a statutory obligation, that remedy thus afforded is exclusive and the statute is the measure of the court's power to render relief.

The Supreme Court of Oregon in the case of AH LEP v. GONG CHOY, 13 Or. page 431, construing Subdivision 4 of Section 559, Oregon Laws, which is as follows:

> "If judgment or decree be given against the appellant, it shall be entered against his sureties also, in like manner and with like effect, according to the nature and extent of their undertaking."

uses the following language:

> *"The language of the provision is peremptory, and is subject to no exceptions that we are able to discover."*

In the case of McCARGAR v. MOORE, 88 Or. 682, on page 685, the court quotes from 6 CORPUS JURIS, Section 740, page 350, as follows:

> "Statutes authorizing summary remedies on forthcoming, delivery or dissolution bonds are to be strictly construed, and are available only where the bond is such as the statute contemplates; and one who seeks to enforce the liability of the obligors in this manner must comply, at least substantially, with the requirements of the statute in respect to all things

> which must be done in order to make the statutory remedy available.''

The statute is mandatory for a third reason: prior to 1907, there was no statute of Oregon providing any remedy upon an attachment bond. The plaintiff was therefore relegated to a common law action. In 1907, the Legislature amended the statute which was then Section 309, Bellinger & Cotton's Code, to provide that judgment be entered against the sureties at the time of the entry or judgment against the defendant in the main action. The purpose of this amendment must be deemed to be two-fold: First, to prevent a circuituity of actions, so that complete relief against both defendant and his sureties could be afforded in one proceeding. Second, to prevent the imposition of double costs on the sureties. Formerly, they were obliged under their bond to pay the costs of the original action, and in a subsequent action upon the bond they would be compelled to pay costs again. The statute also afforded the sureties the right to immediate subrogation to their principal, so that they would not be in such a position as the sureties may find themselves in a case similar to the one at bar, where they are called upon to pay a judgment long after recovery of judgment against their principal.

The postponement of subrogation or recourse by a surety against his principal is recognized to be a detriment. This principle, as is well known, is carried so far in its operation as to release a surety

where the debt for which he is surety has been prolonged without his consent. Therefore, since the amendment must be supposed to be for the benefit of the sureties, as well as of the plaintiff, the sureties have an interest in having the judgment rendered against them in the principal action, rather than in a subsequent action. The statute must be construed to be mandatory, because if it were otherwise, the plaintiff would have the option to disregard its provisions to the detriment of the sureties.

The statute is mandatory for a fourth reason: the said statute, Section 308, Oregon Laws, directs that the judgment shall order the sale of the attached property. The court has held many times that a failure to order a sale of the attached property releases the lien of the attachment. As Judge Bean has held in his opinion, *the bond to discharge the attachment is a substitute for the attached property.* It would logically follow that the failure to enter judgment against the sureties is a waiver of recourse against them. Both the direction as to the sale of the property and the entry of judgment against the sureties being in the same section in the same sentence, and made to accomplish the same purpose, they should be construed alike.

The Supreme Court of Oregon in the following cases has held *that the attachment is waived by a failure to order the sale of the attached property*:

Bremer v. Fleckenstein, 9 Or. 266;

Moore Mfg. Co. v. Billings, 46 Or. 403;
Mertens v. Northern State Bank, 68 Or. 279;
Smith v. Dwight, 80 Or. 14.

In the case of MERTENS v. NORTHERN STATE BANK, 68 Or. 281, the court lays down this rule:

> "When property is attached and the court in entering judgment for the plaintiff, fails to enter an order for the sale of the attached property, the failure to make such order operates as a waiver and discharge of the attachment lien."

If a failure to order the sale of the attached property waives the lien of the attachment, so does a failure to enter judgment against the sureties waive recourse against the sureties.

The bond to discharge the attachment is a substitute for the attached property. If the attached property is released by reason that the judgment entry fails to order the attached property sold, then it follows that if the judgment order fails to take judgment against the sureties on the bond, which stands in lieu of the attached property, then the sureties are released from their liability thereunder.

In a number of cases the Supreme Court of Oregon, starting with the case of SCHNEIDER v. SEARS, 13 Or. 69, 74, and as late as the case of MURPHY v. BJELIK, 87 Or. 329, 352, has laid down the rule *that attachment proceedings are statuatory and unless the statute is strictly pursued, no right is acquired under them.*

The same rule is laid down in 6 CORPUS JURIS, Section 740, page 350, and hereinbefore fully set forth.

That the signing of a bond to release an attachment by sureties makes them parties and constitutes a general appearance by them, has been held many times by the Supreme Court of Oregon.

In the case of WINTERS v. UNION PACKING CO., 51 Or. 97, on page 99, Justice Robert S. Bean says:

> "But where a defendant appears and invokes the judgment of the court upon a matter, which presupposes jurisdiction, or asks relief which can only be granted after jurisdiction has attached, his appearance is general, and gives the court jurisdiction of the person, whether limited to a special purpose or not. The character of the appearance does not depend upon the form of the motion or pleading, but upon its substance, and the relief sought: Belknap v. Charlton, 25 Or. 41 (34 Pac. 758)."

Under the statutes of Oregon, before a defendant may apply to the court for an order discharging an attachment, he must appear in the action. Section 310, Oregon Laws, pertaining to the discharge of an attachment, reads as follows:

> Sec. 310. *MOTION TO DISCHARGE ATTACHMENT.* Whenever the defendant shall have appeared in the action, he may apply, upon notice to the plaintiff, to the court or judge where the action is pending, or to the

> clerk of such court, for an order to discharge the attachment upon the execution of the undertaking mentioned in the next section; and if the application be allowed, all the proceeds of sales, and property remaining in his hands, shall be released from the attachment and delivered to the defendant, upon his serving a certified copy of the order on the sheriff."

The case of ANVIL GOLD MINING CO v. HOXSIE, 125 Fed. 724, which is a decision of the Circuit Court of Appeals of the Ninth Circuit, lays down the rule that the signing of the bond to release an attachment is a general appearance. The case was appealed from the District of Alaska. It involved the construction of Section 150 of the Alaska Code, which is the same as Section 311, Oregon Laws (Olson). The court in its opinion on page 728, says:

> "It may be admitted, for the purposes of this case, that when the defendant in an attachment suit under the Alaska Code gives the undertaking provided in Section 150, he waives his right to question mere irregularities and defects apparent upon the face of the original attachment proceedings."

In the case of ROETHLER v. CUMMINGS, 84 Or. 442, which was a case involving the question as to whether the giving of the undertaking to discharge an attachment (310 Oregon Laws) was a general appearance, uses the following language on page 448:

> "Such an instrument was delivered to the Justice's Court upon an application of the defendants to discharge the attachment in the

proceedings in question and obligated the sureties to pay any judgment that might be rendered against the defendants. Based thereon the property of the defendants was released from attachment. Such a procedure bound them to enter an appearance as contemplated by Section 310, L. O. L., or be proceeded against as in case of personal service. Unlike the undertaking for a re-delivery or forthcoming bond provided for in Section 305, to be given to the attaching officer, the application to discharge the attachment invokes the judgment of the court upon a matter which presupposes and acknowledges the jurisdiction of such tribunal, or asks for relief which can be granted only after jurisdiction has been acquired. Such an appearance by defendants was a general one and gave the Justice's Court jurisdiction of their persons. The character of the appearance does not depend upon the form of procedure, but upon its substance and the relief sought:

WINTER v. UNION PACKING CO., 51 Or. 97 (93 Pac. 930); SPORES v. MAUDE, 81 Or. 11, 17 (158 Pac. 169); ANVIL GOLD MIN. CO. v. HOXSIE, 125 Fed. 724, 728, (60 C. C. A. 492); 4 C. J., p. 1331, Sec. 25, where it is stated:

> 'The giving of a bond operating as a discharge or dissolution of an attachment or garnishment operates as an appearance converting the action from one *in rem* into one *in personam.*' "

If judgment could have been rendered against the sureties in the State Court at the time it was rendered against the defendant, H. B. Thornberry, that would be because the effect of their signing the bond would make them parties to the cause and

operate as a general appearance by them. They would submit themselves to the jurisdiction of the State Court, demanding relief. i. e., the discharge of the attachment. They should be regarded therefore as parties to the cause who have made a general appearance.

If we are correct in our contention, that the signing of the bond made the sureties parties and constituted a general appearance by them, then the judgment rendered in such a cause would be conclusive as to all of the parties In any case, where a plaintiff sues more than one person, all of them appearing generally, a judgment rendered against one of the defendants is a bar in favor of all the other defendants.

Inasmuch as the State Court had jurisdiction to render a judgment against the sureties, then they must have filed a general appearance in the State Court in order for the court to be authorized to render and enter a judgment against them.

We have already shown conclusively, that the language used in Section 308, Oregon Laws, is mandatory and peremptory. If the language in said statute is mandatory, directing that judgment shall be entered against the sureties in the main action, it would necessarily follow that the Federal Court would not have jurisdiction of the action at bar. Whatever judgment would have been rendered in

the State Court would be *res adjudicata,* as to all the parties against whom judgment could have been rendered.

The issue in the case in the State Court, namely the liability of the sureties, is the same issue as is presented in the case at bar.

Since the amendment of 1907 to Section 308, Oregon Laws, there has been no decision in Oregon on the question as to whether or not the remedy given the plaintiff against the sureties in the original action is exclusive. However, we find the question practically decided upon the construction of the statute concerning appeal bonds, Section 554, Oregon Laws, Subdivision 3, (541 Hills, Subdivision 3), which reads as follows:

> "If the appeal be abandoned as provided in Subdivision 2 of this section, thereupon the judgment or decree, so far as it is for the recovery of money, may, by the appellate court, be enforced against the sureties in the undertaking for a stay of proceedings, as if they were parties to such judgment or decree."

The Supreme Court of Oregon, in construing this language in HOLBROOK v. INVESTMENT COMPANY, 32 Or. 104, 106, and following, holds that such language is a direction to the court to enter judgment against a surety, and that the signing of the undertaking by the surety makes the surety a party to the original cause, and is an appearance by him.

In the Holbrook v. Investment Co. case, supra, the following language of Mr. Justice Bradley in BEALL v. NEW MEXICO, 16 Wall. 535, is quoted:

> "A party who enters his name as surety on an appeal bond does it with full knowledge of the responsibilities incurred. In view of the law relating to the subject, it is equivalent to a consent that judgment shall be entered up against him if the appellant fails to sustain his appeal."

We have heretofore in our brief cited the rule from 4 CORPUS JURIS, page 1331, Section 25, which holds that the giving of the undertaking discharging the attachment operates as an appearance and converts the action from one *in rem* to one *in personam.*

Plaintiff in error elected to take judgment in the State Court against the defendant, H. B. Thornberry, only, and not against the sureties who had appeared generally, and who had submitted themselves fully to the jurisdiction of said court. Plaintiff is thereafter barred from instituting a new and separate action against the sureties, involving the same issues as were decided when it entered its judgment against H. B. Thornberry. The failure to obtain a judgment against the sureties deprives any other court in any other cause of the power to render another judgment. *The former judgment is an adjudication.*

The District Court of the United States for the District of Oregon, did not have jurisdiction of the

subject of this action. The Circuit Court of Sherman County, Oregon, had jurisdiction of the persons and the subject of this action, and had full power and authority to make the same adjudication against the sureties, the defendants in error herein, as is sought in the present action. Where a state court has jurisdiction of a cause and of the parties, that jurisdiction is exclusive, and a Federal Court cannot obtain jurisdiction of the case except in the manner provided by law, i. e., by their removal of the cause prior to appearance and the giving of a bond.

We have heretofore conclusively shown that the signing of the bond to discharge the attachment by the sureties constituted a general appearance by them.

IN the case of HOLBROOK v. INVESTMENT CO., 32 Or. 104, the court says on page 107:

> "When judgment is entered against a party it must be conceded that it would bind him if the court rendering the judgment had jurisdiction of his person and of the subject matter of the suit or action; and, such being the case, our statutes above referred to in effect provide that when the surety signs an undertaking on appeal and for a stay of proceedings he forms a privity of contract with the judgment debtor, and like his principal, *thereby becomes a party to and is bound by the judgment.*"

The state court had jurisdiction of the plaintiff in error, in the cause in Sherman County, Oregon, it being the plaintiff in this cause. The state court

had jurisdiction to render judgment against the sureties in the cause in the state court, they being in effect defendants in that court and being defendants in error in this cause. The state court had power to render the same judgment and for the same cause against the sureties in the state court as is sought to be recovered against the same parties, the defendants in error in this cause.

The Supreme Court of Oregon, in the case of MATLOCK v. MATLOCK, 87 Or. 307, on page 312, uses the following language:

> "It is a familiar principle that when a court of competent jurisdiction acquires jurisdiction of the subject matter of a case, its authority continues subject only to the appellate authority until the matter is finally and completely disposed of, and no court of co-ordinate authority is at liberty to interfere with its action. This principle is essential to the proper and orderly administration of the law and in order to avoid conflict in the rendition of final decrees. While its observance might be required on the grounds of judicial comity and courtesy it does not rest upon such circumstances exclusively, but it is usually enforced to prevent unseemly, expensive and dangerous conflicts of jurisdiction and of process."

The court in the latter case cites 7 R. C. L., page 1067, Section 105, which lays down the following rule:

> "It is a familiar principle that, when a court of competent jurisdiction acquires jurisdiction of the subject matter of a case, its authority

continues, subject only to the appellate authority, until the matter is finally and completely disposed of, and no court of co-ordinate authority is at liberty to interfere with its action. This doctrine is applicable both to civil cases and to criminal prosecutions. The principle is essential to the proper and orderly administration of the laws; and while its observance might be required on the grounds of judicial comity and courtesy, it does not rest upon such considerations exclusively, but is enforced to prevent unseemly, expensive and dangerous conflicts of jurisdiction and process. If interference may come from one side, it may come from the other also, and what is begun may be reciprocated indefinitely. An essential condition of the application of the rule as to priority of jurisdiction is that the first suit shall afford the plaintiff in the second an adequate and complete opportunity for the adjudication of his rights, for the rule that the court first acquiring jurisdiction retains it to the end must yield to the higher principle which affords to every citizen the right to have a hearing before a court of competent authority."

In the case of MOUND CITY CO. v. CASTLEMAN, 187 Fed. 921, on page 926, the court said:

> "In a suit between the same parties or those in privity with them upon the same claim or demand a decision upon the merits is conclusive, not only as to every matter offered but as to every matter which might have been offered to sustain or defeat the claim or demand."

The judgment against Thornberry rendered in the state court, was and is a decision upon the merits of the case in the state court and is conclusive

as far as the defendants in error are concerned. They were parties to the action in the state court. The issue in the state court, namely, the liability of the sureties, was and is the same issue as is presented in the case at bar. The decision of the state court is conclusive of every matter which might have been offered to sustain the claim or demand, namely, the right and opportunity to have taken a judgment against the sureties at the same time plaintiff took judgment against H. B. Thornberry.

The Supreme Court of the United States in the case of HEIDRITTER v. ELIZABETH OIL CLOTH CO., 112 U. S. 294, on page 305, said:

> "It is merely an application of the familiar and necessary rule, so often applied, which governs the relation of courts of concurrent jurisdiction, where, as is the case here, it concerns those of a state and the United States, constituted by the authority of district government, though exercising jurisdiction over the same territory That rule has no reference to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. It simply requires, as a matter of necessity, and therefore, of comity, that when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction."

The plaintiff in error in instituting the action in the state court and attaching the property of the

defendant, H. B. Thornberry, waived its right to Federal jurisdiction. The defendants in error, in signing the undertaking discharging the attachment in the state court, and thereby becoming parties to the action in the state court, subjected themselves to the jurisdiction of the state court and waived their right to removal to the Federal Court.

It would necessarily follow that the Federal Court has not jurisdiction to determine a controversy which the state court has already had before it for determination and which it has fully and finally adjudicated.

We respectfully submit that the judgment of the District Court should be sustained and affirmed

JOSEPH, HANEY AND LITTLEFIELD,

PLOWDEN STOTT,

Attorneys for Defendants in Error.